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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ANNEMARIE PATTERSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The Eleventh Circuit's decision in this case extends the reach of 8 U.S.C. §1324(a)(2) (1976) to criminalize conduct to an extent far beyond that which is prohibited by the plain wording of the statute, contravenes congressional intent and conflicts with a decision of the Ninth Circuit. The arguments raised in the brief in opposition in no way detract from these important reasons for granting certiorari.

I. PETITIONER WAS CHARGED ONLY WITH THE UNAUTHORIZED TRANSPORTATION OF UNDOCUMENTED ALIENS AND ALLEGATIONS WITH RESPECT TO OTHER HYPOTHETICAL VIOLATIONS OF THE IMMIGRATION LAWS ARE IRRELEVANT.

Petitioner was charged only with "the offense of un-

authorized transportation of illegal aliens in violation of 8 U.S.C. §1324." Pet. at 5a. It is thus irrelevant for the Government to contend that petitioner's conduct also included "provision of shelter and other services and was otherwise . . . egregious. . . ." Opp. Brief at 5. Similarly, the Government's argument that petitioner also violated the "harboring" prohibitions in §1324(a)(3) has no bearing on the issues presented to this Court. Harboring is a separate, distinct offense. *See United States v. Rubio-Gonzalez*, 674 F.2d 1067, 1073 n.5 (5th Cir. 1982). More importantly, the particular question of statutory construction raised by petitioner—*i.e.*, the limitation imposed by the "in furtherance of" language found in §1324(a)(2)—is simply inapplicable to "harboring" because there is no comparable language in §1324(a)(3).

II. TRANSPORTATION OF UNDOCUMENTED ALIENS IS LEGAL UNLESS IT BEARS A DIRECT AND SUBSTANTIAL RELATIONSHIP TO THEIR ILLEGAL ENTRY INTO THIS COUNTRY.

Section 1324(a)(2) prohibits the transportation of unauthorized aliens only when the transportation is "in furtherance of such violation of law." The plain language of the statute and its legislative history both demonstrate that the "in furtherance" clause confines the prohibitions of 8 U.S.C. §1324(a)(2) to transportation that had a direct or substantial relationship with the alien's entry or presence in the United States.[1] *See* Pet. at 5-8. The Government, however, simply reads the "in furtherance" clause out of the statute. Opp. Brief at 3.

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[1] The government also argues that petitioner's construction of 8 U.S.C. §1324(a)(2) must be incorrect because it would mean that "transportation of an illegal alien two and a half years after his entry into the country would fall outside the scope of the statute. . ." Opp.

The cases cited by the Government for the proposition that "8 U.S.C. §1324(a) extends well beyond the chain of the smuggling process" are inapposite. Opp. Brief at 3. Each of the cases cited by the Government pertains only to *harboring* illegal aliens in violation of §1324(a)(3).[2]

III. THE ELEVENTH CIRCUIT'S DECISION CANNOT BE DISTINGUISHED FROM UNITED STATES V. MORENO.

In *United States v. Moreno*, 561 F.2d 1321 (9th Cir. 1977), the Ninth Circuit held that the transportation of an undocumented alien, in order to be "in furtherance" of the violation of the immigration laws, must bear "a direct or substantial relationship" to "the alien's presence in the United States." 561 F.2d at 1323. The Ninth Circuit decided that because the defendant's transportation of aliens "was only incidentally connected to the fur-

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Brief at 3. Petitioner's construction of §1324(a)(2) would mean no such thing. The instructions requested by petitioner (Pet. at 13a) would have permitted the jury to find that transportation of an undocumented alien anytime within three years of his entry into the country was illegal so long as the transportation had "a direct or substantial relationship" to "furtherance of the alien's presence in the United States." *See United States v. Moreno*, 561 F.2d 1321, 1323 (9th Cir. 1977).

[2] *See Rubio-Gonzalez*, 674 F.2d 1067; *United States v. Cantu*, 557 F.2d 1173 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978); *United States v. Lopez*, 521 F.2d 437 (2d Cir.), *cert. denied*, 423 U.S. 995 (1975); *United States v. Acosta De Evans*, 531 F.2d 428 (9th Cir.), *cert. denied*, 429 U.S. 836 (1976). To the extent that the cases cited by the Government have any relevance to the offense of transportation of illegal aliens, the cases actually reinforce petitioner's arguments. These cases stand for the propositon that "the term [harbor] was intended to encompass conduct tending *substantially* to facilitate an alien's 'remaining in the United States illegally.' " *United States v. Lopez*, 521 F.2d at 441 (emphasis supplied); *accord, Cantu*, 557 F.2d 1180; *Rubio-Gonzalez*, 674 F.2d at 1073. Compare petitioner's Request to Charge No. 1, Pet. at 13a.

therance of the violation of law," the defendant's conviction had to be reversed. *Id.* at 1322. In petitioner's case, the district court refused to give the jury instructions embodying the language used in *Moreno*. *See* Pet. at 13a, 14a. Since the Eleventh Circuit affirmed the district court's refusal to give these instructions, the decision in this case plainly conflicts with *Moreno*.

The government cannot distinguish this case from *Moreno* by recitation of evidence upon which the jury *could* have found petitioner guilty under a proper construction of Section 1324(a)(2). Opp. Brief 2-3, 5. The testimony cited by the government with regard to petitioner's alleged contacts with undocumented aliens at the time of their entry into this country was disputed at trial.[3] Because the trial court's instructions in effect told the jury that petitioner's contacts with the undocumented aliens *after* they arrived in Georgia were in and of themselves illegal, the jury was not permitted (i) to consider whether that conduct—the fact of which was undisputed at trial—was not "in furtherance" of the undocumented aliens' entry into this country (and therefore legal) and (ii) to believe petitioner's testimony—as opposed to the testimony of the aliens—that she did not have other contacts with the undocumented aliens directly and substantially related to their entry into this country. Thus, the government cannot legitimately contend that the erroneous instructions submitted to the jury were harmless error[4] or that important issues of statutory construction and a direct conflict between the circuits are not presented by this petition.

[3] *See* Opp. Brief at 2 and *compare* with T. pp. 217-219, 222, 246 (cited at p. 3 of Pet.).

[4] "[I]n jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury. . . ." *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919).

IV. THE ELEVENTH CIRCUIT'S DECISION IMPERMISSIBLY CRIMINALIZES EMPLOYMENT OF UNDOCUMENTED ALIENS.

The trial court implicitly instructed the jury that the transportation of undocumented aliens for employment purposes was automatically a violation of §1324(a)(2) when it stated that the act of furnishing a job to an undocumented alien was one example of an action that was in furtherance of that alien's continued illegal presence in the United States.[5] It is, of course, up to Congress to make such decisions. *See United States v. Evans*, 333 U.S. 483, 486 (1948) ("defining crimes and fixing penalties are legislative, not judicial functions"). The district court's instructions gave such a broad reading to Section 1324 (a)(2) that the effect of the Eleventh Circuit's affirmance of those instructions was to expand the scope of the statute in such a way as to "make a surprisingly broad range of unremarkable conduct a violation of federal law." *Williams v. United States*, 102 S.Ct. 3088, 3093 (1982) (reversing a Fifth Circuit decision which affirmed the Government's interpretation of 18 U.S.C. §1014 (1976)).

It is all the more clear that employment of undocumented aliens is not a violation of current immigration

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[5] The government further suggests that the employment related transportation of illegal aliens is within the intended reach of §1324(a) by notice that (i) §1324(a) provides that employment of an illegal alien (including usual and normal practices incident to employment) is not deemed to constitute harboring and (ii) there is no such exception in the case of persons transporting illegal aliens to places where they may find work. Opp. Brief at 5. However, "[w]hile the 'mere employment' exemption applicable to harboring does not apply to the 'transporting' phase of the statute, it does not follow that the statute is violated by an employer transporting an alien employee who is improperly in the United States." C. Gordon and H. Rosenfield, 2 *Immigration Law and Procedure*, 9-56 (Supp. 1982).

laws because there is legislation now pending the purpose of which is to make it illegal to employ undocumented aliens. This legislation—the Immigration Reform and Control Act of 1983—would, if enacted, make it unlawful for any employer knowingly to hire or recruit for a fee any alien not authorized to work in the United States. *See* H.R. 1510 & S. 529, 98th Cong., 1st Sess. (1983). In view of this pending legislation, it is obvious that (i) the current law does not prohibit the transportation of undocumented aliens for employment purposes where such transportation is unassociated with their entry into this country and (ii) the Eleventh Circuit misconstrued that law when it endorsed the trial court's statement to the jury that providing employment to undocumented aliens was an example of a violation of 8 U.S.C. §1324(a)(2).

CONCLUSION

The petition for writ of certiorari should be granted.

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